IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/09/2003

CORAM

THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN
and
THE HONOURABLE MR.JUSTICE T.V.MASILAMANI

A.S.No.936 of 1988

1. Jayaraman (died)
2. Ranjitham
3. K.Muthu Rathinasamy
4. Arjunan
5. Subbathal
6. Palaniammal
7. Selvathal
8. Ganesan (Minor)
9. Indumathi(Minor)

(Appellants 8 & 9 represented by their mother, N.F. Palaniammal, 6th appellant)

(Appellants 5 to 9 brought on record as LRs. of deceased first appellant. ... Appellants.

-Vs-

1. Dalavai Nagarajan
2. R.B.Ram Manohar
3. N.S.Balan
4. Palanisamy ... Respondents.

Appeal filed against the judgment and decree dated 22.7.1988 in O.S.No.136 of 1984 on the file of Sub Court, Dharapuram.

!For appellants :: Mr.V.K.Muthusamy, Sr.counsel for Mr.Meenakshisundaram.

^For respondents :: Mr.R.Ashokan, for R1.
N.A. for R3 & R4.
R-2 .. Given up.

:JUDGMENT

N.V.BALASUBRAMANIAN,J.

This is an appeal filed by the defendants 2 to 5 in a suit for specific performance which was decreed by the learned Subordinate Judge, Dharapuram in O.S.No.136 of 1984, by judgment dated 22.7.1988.

2. The plaintiff is the first respondent in the appeal who instituted the suit for specific performance of the agreement of sale and for directing the defendants to deliver possession of the suit property to the plaintiff subject to the sixth defendant delivering possession of Door No.44-A on 1.3.1985 and for other reliefs found in the plaint. The case of the plaintiff is that the plaintiff and the first defendant entered into a written agreement of sale on 25.2.1984 wherein it was agreed that the first defendant would sell the suit property to the plaintiff for a consideration of Rs.1 lakh and a sum of Rs.2 0,000/- was paid as advance towards the sale price on the date of agreement itself. It is stated that three months time was fixed for the payment of balance of sale consideration of Rs.80,000/- for the execution of the deed of sale by the first defendant in favour of the plaintiff and for delivery of possession of the suit property. It is stated that the plaintiff was always ready and willing to perform his part of the contract. It is also averred that the sixth defendant was a tenant of a portion of the property bearing door No.44-A and he instituted a suit in O.S.No.140 of 1984 on the file of District Munsif, Dharapuram against the owner of the property, namely, the first defendant as well as the plaintiff seeking the relief of permanent injunction which resulted in a compromise decree on 4.3.1984 and according to the compromise decree, the sixth defendant has to deliver the portion of the suit property in his possession on 1.3.1985 and until then, he would pay the rent of Rs.12/- per day to the plaintiff and certain other conditions were also imposed. Hence, the relief of possession was claimed against the sixth defendant. The seventh defendant has also been impleaded on the ground that he is the husband of the third defendant and the defendants 2,4,5 and 7 are doing business in the name and style, 'Indhira Stores' in a portion of the property bearing door No.44 and the seventh defendant has been added as a party out of abundant caution as the suit has also been filed for possession. It is stated that the defendants 2 to 5 claimed to have purchased the property from the first defendant on 2.5.1984. It is stated that the aforesaid sale deed does not affect the rights of the plaintiff under the suit agreement of sale dated 25.2.1984. According to the plaintiff, the defendants 2 to 5 purchased the property after they were fully aware of the suit agreement of sale dated 25.2.1984. It is stated that the defendants 2 to 5 wanted to purchase the property and requested the plaintiff to give up his rights under the suit agreement in respect of Door No.44, but the plaintiff did not accede to the request and after that, the defendants 1 to 5 and 7 colluded together and brought about the sale deed dated 2.5.1984. It is also stated that the defendants 2 to 5 are not bona fide purchasers and they have not paid the money in good faith and without notice of the suit agreement and the defendants 2 to 5 were aware of the suit agreement. It is stated that the plaintiff was always ready and willing to perform his part of the contract and after coming to know about the collusive sale deed executed by the first defendant in favour of the defendants 2 to 5, the plaintiff caused a notice to be issued for the execution of sale deed in his favour on or before 25.5.1984, but the first defendant evaded the receipt of the notice and the defendants 2 to 5, though served with the notice, have not sent any reply. Hence, the

plaintiff has filed the suit on 11.6.1984 for specific performance and also for the relief of possession.

3. The first defendant in the suit remained ex parte and so also the sixth defendant. The defendants 2 to 5 have filed a common written statement and according to their written statement, the defendants 2 to 5 entered into an agreement of sale of the suit property with the first defendant on 18.11.1983 and paid an advance of Rs.30,000/- to the first defendant for which a voucher/receipt has been given by the first defendant. It is their specific case that the first defendant colluded with the plaintiff and created a bogus and ante-dated agreement of sale and the plaintiff was not having the capacity to pay the advance amount of Rs.20,000/-. According to the defendants 2 to 5, the plaintiff is not having the capacity to pay Rs.1 lakh. It is their case that out of the collusive action between the first defendant and the plaintiff the suit agreement has been entered into. It is stated that after the issue of notice by the plaintiff through his advocate, the fifth defendant met the plaintiff at Dharapuram and set forth their sale from the first defendant for which the plaintiff replied that only at the instigation of the first defendant he created the ante-dated agreement and he is not going to press the same. It is stated that believing the words of the plaintiff the defendants 2 to 5 did not send any reply. It is stated that a varthamanam was executed by the sixth defendant in favour of the defendants 2 to 5 on 2.5.1984 to the effect of delivering of possession of the building bearing door No.44A. It is their case that the sixth defendant is not in possession of the property. It is stated that the defendants 2 to 5 are not concerned with the suit in O.S.No.140 of 1984 on the file of District Munsif, Dharapuram. It is state d that the defendants 2 to 5 entered into the sale agreement with the first defendant even on 18.11.1983 and this sale agreement is prior to the suit agreement of sale. It is also stated that they had no knowledge of the suit agreement of sale. It is stated that the sale deed in their favour has been acted upon. It is also stated that the plaintiff is not having the capacity to pay the balance of sale consideration. It is their specific case that the suit agreement is ante-dated. The defendants 6 and 7 have filed separate written statements.

4. Learned Subordinate Judge, Dharapuram framed necessary issues for consideration and came to the conclusion that the case pleaded by the defendants 2 to 5 that there was an agreement of sale dated 18.11.1983 was not correct and the sale deed was executed by the first defendant in favour of the defendants 2 to 5 to defeat the rights of the plaintiff under the suit sale agreement. He also came to the conclusion that the defendants 2 to 5 were not transferees in good faith. He also held that the agreement dated 18.11.1983 was not a genuine agreement and the said agreement was created by the first defendant along with the defendants 2 to 5 and they were not bona fide purchasers for value. Learned trial Judge also held that the plaintiff has the capacity to pay the advance amount and the plaintiff would be entitled to the relief of specific performance and also to the relief of possession. It is against the judgment and decree, the present appeal has been preferred.

5. We heard Mr.V.K.Muthusamy, learned senior counsel appearing for the appellants and Mr.R.Ashokan, learned counsel for the first

respondent. After hearing the arguments, we formulate the following points for consideration:

1. Whether the agreement of sale dated 18.11.1983 entered into between the first defendant and the defendants 2 to 5 is a genuine and valid one?

2. Whether the suit agreement of sale dated 25.2.1984 is a true, valid and genuine agreement?

3. Whether the agreement dated 18.11.1983 is prior in point of time to the suit agreement dated 25.2.1984?

4. Whether the plaintiff is entitled to the relief of specific performance?

5. If the Court holds that the agreement dated 18.11.1983 is not established, whether the defendants 2 to 5 are bona fide purchasers for value and without notice of the suit agreement dated 25.2.1984?

6. Though separate points have been framed, the points that arise in point Nos.1 to 5are connected and therefore we propose to deal with them all together. Mr.V.K.Muthusamy, learned senior counsel submitted that the agreement dated 18.11.1983 (Ex.B-18) is true and valid. He submitted that the trial Court was not correct in its view that the stamp vendor, Vengidusamy, who was examined as P.W.3, has not sold the stamp papers on 18.11.1983 to the fourth defendant in the suit. He submitted that the trial Court has relied upon the evidence of P.W.3 where he has denied his signature in Ex.B-18 and also stated that he has not entered the serial number 5508 in Ex.B-18 and also stated that the name Muthurathinasami found in the deed was not written by him. P.W.3 has also deposed that the date 18.11.1983 in Ex.B-18 was not written by him. He has stated that he has not sold to the fourth defendant the stamp papers used for preparing Ex.B-18. We have carefully gone through the evidence of P.W.3. P.W.3, in his evidence, has admitted that it is the duty of the stamp vendor to write on the stamp paper the serial number and the name and address of the purchaser of the stamp paper. He has also admitted that the entries found in page No.9 (Ex.B-21) of the Stamps Sales Register were written by him. He has stated that he would not write false accounts in the Stamps Sales Register. He has also admitted that on 19.12.1984 he has handed over the balance stamp papers to one Paramasivam under Ex.B-20 when he ceased to carry on the profession of stamp vendor. He has admitted that the Revenue Divisional Officer has inspected the Stamps Sales Register and signed on 5.6.1984 under Ex.B-19.

7. We have seen the Stamps Sales Register of P.W.3 and in page 9 of that register there are entries bearing serial Nos.5507 and 5508 which indicate that two stamp papers of Rs.10/- each were sold to one Muthu Rathinasamy of Chelampalayam. We have noticed that P.W.3 admitted that all entries found in page-9 of the Stamps Sales Register were written by him and the Revenue Divisional Officer concerned has verified the book on 5.6.1984 and certified the same. It is also in evidence that only on 19.12.1984 he handed over the register along with the balance unsold stamp papers to one Paramasivam and the register was in the custody of Paramasivam from

19.12.1984. Though as against the entry in Serial Nos.5507 and 5508, there is slight smudging in the name of the purchaser, after P.W.3 admitted in his crossexamination the entries found in page-9 of the said Register were written by him, it must be held that he has written the name found in that page. Further, P.W.3 was not examined by the plaintiff on reexamination with reference to the particular entry found in page-9 of the register.

8. Learned Subordinate Judge has given undue importance to the slight smudging on the name found in serial Nos.5507 and 5508 and taking note of the statement of P.W.3 that he has not sold the stamp papers to the fourth defendant, he came to the conclusion that the stamp papers were not purchased on 18.11.1983. We are unable to approve the reasonings of the learned Subordinate Judge as the learned Subordinate Judge has overlooked the evidence of P.W.3 as he has admitted that all the entries found in page No.9 of the register were written by him and he was not in the habit of writing false entries and the Revenue Divisional Officer verified and countersigned the register on 5.6.1984. Apart from that, P.W.3 himself has stated that it is the duty of the Stamp Vendor to write the name and address of the purchaser of the stamp papers and also the serial number on the stamp papers sold by him, and therefore that part of the evidence of P.W.3 that the signature found in Ex.B-18 is not his signature and he has not written the name, Muthu Rathinasamy of Chelampalayam and serial No.5508 and date 18.11.1983 found in the document is not acceptable as it goes against his own admission that it is his duty to write the name and address of parties to whom stamp papers were sold and the entries found in page-9 of the register were written by him. Hence, we are not able to sustain that part of the finding of the learned Subordinate Judge that P.W.3 has not sold the stamp papers bearing the date 18.11.1983 to the fourth defendant. Though the view of t he learned Subordinate Judge that P.W.3 has not sold the stamp papers dated 18.11.1983 is not correct, yet, it is for the defendants 2 to 5 to prove that the agreement was actually entered into on 18.11.1983 between them and the first defendant and that has to be established only by other independent evidence.

9. The defendants 2 to 5, to prove that the agreement was entered into on 18.11.1983, have examined the second defendant as well as the fifth defendant as D.Ws.1 and 2 and one Palani, who was one of the attestors of the agreement as D.W.3. Before examining the evidence let in on behalf of the defendants, we are of the view that it would be necessary to examine the pleadings. The defendants 2 to 5, in their written statement, have pleaded that the defendants 2 to 5 entered into an agreement of sale of the suit property with the first defendant on 18.11.1983 and paid an advance of Rs.30,000/- for which the first defendant issued a voucher or receipt. But, there is no specific reference to the written agreement of sale in paragraph-4 of the written statement. Though in paragraph-7 of the written statement the defendants have stated that they entered into an agreement of sale on 18.11.1983, in the sale deed executed by the first defendant in their favour dated 2.5.1984 (Ex.B-1) there is no reference to the agreement of sale dated 18.11.1983. Further, in the earlier part of the written statement they have stated that a voucher was issued for the receipt of the advance payment of Rs.30,000/-. We are of the view that the question of issue of a separate voucher would normally arise when there is no written agreement of sale as the

agreement itself would evidence the payment and receipt of advance amount. Though the deed of sale refers to an agreement, it is significant to notice that the defendants have not specifically referred to the agreement of sale dated 18.11.1983 in the deed of sale.

10. It is true that, in normal circumstances, the fact that the agreement of sale (Ex.B-18) was not shown in Ex.B-1 sale deed may not raise any suspicion regarding the existence of the agreement dated 18.1 1.1983. But, when there are other surrounding circumstances to show that Ex.B-18 could not have been entered into on 18.11.1983, the burden is very heavy on the defendants to prove the existence of the agreement Ex.B-18 and each one of the circumstances would assume importance. The defendants have chosen to rely on two witnesses, D.Ws.1 and 2 who were parties to the agreement. One of the attestors to the agreement, who was examined as D.W.3, has not spoken about the attestation of the document. The defendants have also not produced evidence to show that they actually paid the advance amount of Rs.30,000/- on 18.11.1983. The voucher or receipt, which they referred to in the written statement was not produced. There would be some evidence to show that necessary money was withdrawn from some bank or other institution for the purpose of payment of Rs.30,000/- to the first defendant on 18.11.1983. The defendants have not established that the money was actually tendered on 18.11.1983 as there is no evidence at all for the said payment. The recital in Ex.B-18 that the amount of Rs.3 0,000/- was paid is also not proved as the attesting witness D.W.3 has clearly stated that he was not present at the time of execution of the agreement of sale, Ex.B-18.

11. Another interesting aspect is that as soon as the plaintiff became aware of the deed of sale dated 2.5.1984, he issued a notice dated 15.5.1984 to the defendants 1 to 5 and the plaintiff has produced the postal acknowledgment cards in Exs.A-5 to A-7 for the service of notice on the defendants 2, 4 and 5. The third defendant is the wife of the seventh defendant and the seventh defendant in his written statement has admitted that he was helping his wife in getting the sale deed jointly with the defendants 2, 4 and 5. It can be safely assumed that the third defendant was aware of the notice, Ex.A-3 as she is a joint purchaser along with the defendants 2, 4 and 5. The defendants 2 to 5, even after the receipt of Ex.A-3 notice, have kept quiet and if there was an earlier agreement of sale dated 18.11.1983 which formed the basis for the deed of sale dated 2.5.1984, the normal reaction would be to reply the notice stating that their agreement was prior in point of time. Though the fifth defendant (D.W.2) has stated that he met the plaintiff after the receipt of notice, the plaintiff (P.W.1) has denied the same and there is no acceptable evidence to prove that the fifth defendant met the plaintiff after the receipt of notice in Ex.A-3.

12. Now, let us consider the evidence of D.Ws.1 to 3. As far as D.W.1 is concerned, in the chief-examination, he has stated that the agreement was entered into on 18.11.1983 and the agreement was written in a lodge, but he was not able to remember the name of the lodge where the agreement was written. He was also not able to state who was the scribe, who wrote the agreement and who were the attesting witnesses to the agreement dated 18.11.1983. His evidence is not acceptable for the reason that

Dharapuram is a town and it is difficult to believe that he was not able to remember the lodge in which the agreement was executed. It is also relevant to mention that D.W.1 has stated that the fourth defendant has purchased stamp papers, but the fourth defendant has not entered into the box and deposed regarding the date of purchase of the stamp papers. D.W.1 was also not able to remember as to who are the attesting witnesses to the document. The evidence of D.W.1 is also vague as he has not stated as to who negotiated with the first defendant regarding the agreement of sale.

13. As far as D.W.2 is concerned, though in his chief examination he has spoken about the agreement, he has stated that the sale price agreed was Rs.1,50,000/-, (Even assuming that the amount of Rs.1,80,000/- mentioned in his deposition is wrongly mentioned for Rs.1,50,00 0/-), he has stated that the talk regarding the agreement took place only at Indhira Stores. There is a clear contradiction between the evidence of D.W.1 and D.W.2 as D.W.1 has deposed that the agreement was executed at a lodge whereas D.W.2 in his evidence has stated that the agreement was arrived at Indhira Stores and he has not stated that the agreement was executed at a lodge.

14. As far as D.W.3, one of the attesting witnesses, is concerned, he has, in his cross-examination, categorically admitted that he was not present at the time when the amount was agreed to between the parties and he signed the agreement when the document was brought to him for signature by one of the agreement holders. The other attesting witness was also not examined. The evidence let in on behalf of the defendants regarding the execution of the agreement of sale do not inspire much confidence as there is a conflicting version regarding the place where the agreement was entered into and there is also no proof when the agreement was entered into as the attesting witness who was examined as D.W.3 has clearly stated that he was not present at the time when the agreement was entered into, but signed the agreement later when it was brought to him for his signature.

15. It is also relevant to mention here that in the agreement of sale dated 18.11.1983 (Ex.B-18) the parties have stated that the amount of sale consideration was arrived at Rs.1,50,000/- and a sum of Rs.3 0,000/- was received as advance in the presence of the attesting witnesses. The above statement implies that the attesting witnesses were present at the time of execution of the agreement. But, the attesting witness who was examined as D.W.3 has clearly stated that he was not present at the time when the agreement was entered into and he signed the agreement only when the document was brought to him for signature. D.W.3 has also stated that he was not aware of the name of the other attesting witness and the person who brought the document to him for signature. If the statement of D.W.3 is accepted, the statement made in Ex.B-18 that a sum of Rs.30,000/- was paid in the presence of attesting witnesses is not true. In our view, the evidence let in on behalf of the defendants regarding genuineness of the document, Ex.B-18 has to be read in the light of the circumstances mentioned earlier.

16. Now, let us consider the circumstances that happened earlier. We have noticed that the defendants 2 to 5 have not produced the

voucher or the receipt issued for the payment of advance on 18.11.1983 by the first defendant. A reading of the agreement dated 18.11.1983 shows that the first defendant has received a sum of Rs.30,000/- as advance in the presence of attesting witnesses and the defendants have not established as to what was the necessity for the issue of a receipt or voucher for the advance amount received, if an agreement had been entered into acknowledging the payment of advance of Rs.30,000/-. Mr.V.K.Muthusamy, learned senior counsel submitted that though there is no reference to Ex.B-18 in the sale deed (Ex.B-1), the sale deed substantially refers to the agreement and therefore he submitted that the non-mention of the date of agreement of sale, namely, 18.11.198 3 in the sale deed would not cast a doubt on the genuineness of the agreement dated 18.11.1983 (Ex.B-18). In normal circumstances, as mentioned earlier, the non-mention of the date of agreement in the sale deed may not assume much importance, but when there is a dispute about the existence of agreement, the non-mention of the date of agreement in the sale deed assumes importance.

17. Though Mr.V.K.Muthusamy, learned senior counsel submitted that the mention of the date of agreement of sale in the sale deed is unnecessary as the sale was completed on 2.5.1984 and the defendants did not anticipate a claim from the intermediary agreement holder, we have already held that the non-mention of the date of agreement of sale would be relevant and that cannot be ignored in deciding the question as to the genuineness of the agreement of sale dated 18.11.1983. As far as the non-reply to the notice Ex.A-3 is concerned, Mr.V.K. Muthusamy, learned senior counsel submitted that the sale was completed even before the receipt of Ex.A-3 and the defendants 2 to 5 became the owners and they are entitled to ignore the notice, Ex.A-3. He further submitted that explanation was given in the written statement and in the evidence and the absence of reply did not amount to estoppel. We are of the view that the normal reaction of the party who has received a notice from a person claiming rights in the property purchased by him would be to send a reply to the same, though the fact that they have not sent a reply is not decisive, but the non-reply by the defendants 2 to 5 to the notice under Ex.A-3 is also a relevant circumstance.

18. There are three circumstances which are against the defendants, namely, their own case in the written statement that there was an agreement of sale on 18.11.1983 and a voucher, for the payment of advance of

Rs.30,000/-, which was not produced, the non-mention of the date of agreement of sale in the deed of sale dated 2.5.1984; and the non-reply to the notice under Ex.A-3 issued by the plaintiff.

19. Though there may be some explanation for each one of the factors, all the circumstances, if taken together in the light of the evidence let in by the defendants, in our view, would indicate that the agreement dated 18.11.1983 is not a valid and genuine agreement. Mr. V.K.Muthusamy, learned senior counsel submitted that in the plaint the plaintiff has not raised any plea regarding the genuineness of the agreement dated 18.11.1983 and in the absence of any plea regarding the genuineness of the agreement, any amount of evidence let in by the plaintiff on the genuineness of the agreement is of no

avail. He also submitted that the defendants have raised a plea in the written statement regarding the agreement dated 18.11.1983 and there was no notice to the defendants even after the filing of the written statement calling upon them to file the agreement dated 18.11.1983 and the plaintiff also did not file any reply statement denying the genuineness of the agreement (Ex.B-18). Learned senior counsel, in support of his submission, relied upon the decision of this Court in NALLUSWAMY REDDIAR v. MARAMMAL (2000 (I) CTC 484) where E.Padmanabhan,J. held as under:-

" The first plaintiff had not pleaded that the second defendant had knowledge of the alleged prior agreement to sell. The plaintiff was very much aware of the sale deed executed by the first defendant in favour of the second defendant, but he had not challenged the same as the purchase of the second defendant was with full knowledge of the prior agreement to sell. The second defendant had also stated that he is a bona fide purchaser for valuable consideration without notice and that the first plaintiff had not only to plead but also to prove that the second defendant had knowledge of the alleged agreement to sell in his favour. In any event, the plaintiff had to plead and prove that the second defendant, subsequent purchaser had notice of the agreement in favour of the first plaintiff. As already pointed out that there is no such plea and consequently no amount of evidence could be looked into. There are material documents to prove that the second defendant has paid full consideration and the execution of the sale deed by the first defendant had been proved."

20. Learned senior counsel also relied upon the decision of the Privy Council in MT.FATMA BIBI v. SAADAT ALI (AIR 1930 P.C. 99) and submitted that it is open to the respondent to rely upon the earlier agreement in his favour and the rights of the respondent would not be affected by his knowledge of the subsequent contract in favour of the plaintiff before obtaining the conveyance. Learned senior counsel also referred to the following passage in G.C.V.Subba Rao's Law of Specific Relief (5th Edn., at page 888):

" A subsequent contract cannot be enforced against the earlier contractee in respect of the same property (Punjab Banking Co. v. Muhammad, A.I.R.1925 Lah. 542: 6 Lah 344: 89 I.C. 615; Sheikh Ahmad v. Amir Khan A.I.R.1928 Nag. 211: 107 I.C.905). So if the subsequent transfer is itself based upon an earlier contract there can be no specific performance of an intermediate contract. When the subsequent purchaser had prior knowledge of an agreement of sale of the land he subsequently purchased, the subsequent purchaser cannot resist the plea of specific performance (Kishan Singh v. Hardial Singh, (1992) 2 Cur.Civ. Cas.80 (P & H)."

In our view, the decision of the Supreme Court as well as the decision of this Court and the above passage relied upon by the learned senior counsel have no application to the facts of the case as the defendants have not established the genuineness and validity of the agreement dated 18.11.1983.

21. It is the case of the plaintiff that he was not aware of the agreement of sale dated 18.11.1983 and if he had knowledge, he could have pleaded the same. Secondly, even in the written statement the defendants have referred to the voucher or the receipt executed by the first defendant and

they have not referred to the written agreement of sale dated 18.11.1983. Hence, the inaction of the plaintiff in calling upon the defendants to produce the written agreement dated 18.11.1 983 is not material and under the relevant provisions of the Code of Civil Procedure, it is not incumbent upon the plaintiff to file a reply statement also. Further one of the issues framed was whether the defendants 2 to 5 have obtained the deed of sale in a bona fide manner and in considering the issue, the question regarding the genuineness of the agreement dated 18.11.1983 was gone into. As a matter of fact, the parties also understood the issue in that manner and evidence was let in on this aspect. Further, the the burden is on the defendants 2 to 5 to prove the validity and genuineness of the agreement dated 18.11.1983 (Ex.B-18) and hence, the submission of learned senior counsel that there was no pleading regarding the genuineness of Ex.B-18 agreement and therefore the evidence let in on the genuineness of Ex.B-18 should be accepted and Ex.B-18 should be declared valid is not acceptable.

22. Though we are unable to agree with the view of the trial Court on the question whether the stamp papers were sold on 18.11.1983, other circumstances which we have noticed earlier do indicate that the agreement dated 18.11.1983 is an anti-dated agreement and was prepared to defeat the claims of the plaintiff. Another interesting aspect is that after the plaintiff has entered into his agreement of sale with the first defendant on 25.2.1984, the plaintiff informed the sixth defendant that he had entered into an agreement of sale with the first defendant and requested the sixth defendant to hand over vacant possession of the property in the occupation of the sixth defendant which forced the sixth defendant to file a suit for injunction in O.S. No.140 of 1984 on the file of District Munsif, Dharapuram. The sixth defendant in the written statement has admitted the same. The sixth defendant has also stated that at the request of the first defendant, he was paying the daily rent to the agent of the plaintiff, by name, Ganapathy till 28.9.1984. D.W.3, in his deposition, has stated that at the time of agreement, the sixth defendant was having a shop at Door No.44-A taken on lease, but the plaintiff has not forcibly demanded the sixth defendant to vacate the shop. He also admitted that he knew the sixth defendant, but he denied the knowledge of filing of the suit by the sixth defendant. It is clear from the evidence of D.W.3 that he has not come out with true facts as the sixth defendant himself, in his written statement, has admitted that the plaintiff forced him to vacate the property, but whereas, D.W.3 has given false evidence on this aspect that there was no forceful demand to vacate the property.

23. We hold that the defendants have not proved the execution of the agreement in Ex.B-18, particularly when the attestor has not supported the case of the defendants 2 to 5. We hold that the defendants 2 to 5 have not discharged the burden and the view of the trial Court, which had the opportunity of seeing the demeanour of the witnesses, that the evidence let in on behalf of the defendants is not reliable is acceptable and we affirm the finding of the trial Court that the agreement of sale dated 18.11.1983 is anti-dated, brought out to defeat the claims of the plaintiff.

24. Moreover, it is well-nigh impossible to believe that the

defendants 2 to 5 were not aware of the action taken by the plaintiff against the sixth defendant to evict him which forced the sixth defendant to file a suit. The defendants 2, 4, 5 and 7 are doing business in the adjacent Door No.44 and therefore it is impossible to believe the pretence of the defendants that they are not aware that their neighbour, namely, the sixth defendant, was threatened by the plaintiff to hand over possession of the shop No.44-A as both the Door Nos.44 and 44-A are adjacent and they are covered in the suit agreement.

25. In this connection, it is relevant to notice the decision of the Supreme Court in GOVINDDAS (Dr.) V. SHANTIBAI (1973) 3 SCC 418) wherein the Supreme Court held as under:-

"14. It will be noticed that the evidence is contradictory and we have to decide whose version is more acceptable. The learned counsel for the appellants contended that the onus of proof was very light on the appellants and they had discharged it by entering the witness box and stating that they had no knowledge. we are unable to agree with him that in the circumstances of this case the onus was light on the appellants. The circumstances that tell heavily against the version of the appellants are these. First, all the parties are residents or have shops in the same vicinity and in places like this it is not probable that the appellants would not come to know of the execution of the agreement (Souda-Chitthi) of the plaintiff. Secondly, the haste with which the sale deed in favour of the appellants was executed was unusual. It is more usual for an agreement to be executed in such cases rather than arrive at an oral agreement on one day and have the sale deed executed the next day and registered the following day. For some reason the appellants were in a hurry to get the deed registered. What was the reason? In view of all the circumstances we are inclined to accept the evidence of Hem Raj Chouhan, and corroborated by Hayat, that Goverdhandas knew of the execution of the agreement with the plaintiff on March 1, 1960"

We are of the view that the principle laid down by the Supreme Court would equally apply here as the circumstances clearly show that the defendants 2, 4, 5, 6 and 7 are having shops in the same place and it is not probable that the defendants 2 to 5 were not aware of the action taken by the plaintiff against the second defendant which was done on the basis of the agreement of sale in his favour, particularly when the sixth defendant filed a suit against the plaintiff and the first defendant seeking the relief of injunction on the ground that the plaintiff was attempting to dispossess him forcibly from his shop. Further, the fact that the sale deed in favour of the defendants 2 to 5 was executed on 2.5.1984 (Ex.B-1) just before the expiry of three months' time stipulated in the suit agreement of sale dated 25.2.1984 shows that the defendants 2 to 5 were in hurry to get the sale deed and the reason for getting the deed of sale in their favour in a hurried manner can only be to defeat the rights of the plaintiff under the suit agreement of sale, Ex.A-1.

27. As far as the agreement of sale entered into between the plaintiff and the first defendant dated 25.2.1984 (Ex.A-1) is concerned, the only allegation is that it is a bogus one and anti-dated and the plaintiff and the first defendant colluded together subsequent to the deed of sale in favour of the defendants 2 to 5. The plaintiff has examined himself as P.W.1 and he

has spoken about the agreement Ex.A-1. The sixth defendant in the plaint filed by him in O.S.No.140 of 1 984 on the file of District Munsif, Dharapuram has stated about the existence of the agreement between the plaintiff and the first defendant. The said suit was instituted admittedly on 7.3.1984 which was much prior to the sale in favour of the defendants 2 to 5 was on 2.5.1 984. The sixth defendant in the written statement has stated that he was paying the rent to the agent of the plaintiff till 28.9.1984 even after the deed of sale dated 2.5.1984.

28. Learned senior counsel for the appellants referred to Exs.A-8 and A-9 and also the evidence of P.W.2, the advocate who appeared for the sixth defendant in the suit for injunction before the District Munsif's Court, Dharapuram and submitted that there is variation between Exs.A-8 and Ex.A-9 as regards signatures of parties. In our view, it is not necessary to go into the question whether Ex.A-9 is the true copy of Ex.A-8. But in Ex.A-9, which is said to be a copy taken from Ex.A-8 filed in the District Munsif's Court, Dharapuram, there is seal of that Court dated 17.3.1984. In Ex.A-9 there is an endorsement directing the parties to be present after two weeks to record the compromise. Learned District Munsif returned the memo of compromise on 17.6.1984 and again, he returned it on 27.7.1984. We are unable to appreciate the action of the learned District Munsif, Dharapuram in returning the original memo of compromise filed in the Court. Learned District Munsif should have retained the original memo of compromise on the file of the Court itself and when the parties were not present, he should have directed the parties to be present and should not have returned the memo of compromise filed in the Court. The action of the learned District Munsif in returning the original memo of compromise has now given rise to the question regarding the genuineness of the compromise between the sixth defendant and the plaintiff and the first defendant herein in the suit filed by the sixth defendant in O.S.No.140 of 1984.

29. One important fact that is relevant is the statement made by the sixth defendant in his written statement that he has instituted a suit in O.S.No.140 of 1984. He has also admitted that he was paying the rent to the plaintiff's agent, by name, Ganapathy till 28.9.1984 . The defendants 2 to 5 have produced the document, Ex.B-9 namely, the memo filed by the plaintiff in O.S.No.140 of 1984 on the file of District Munsif, Dharapuram wherein it is stated that on 6.2.1985 the sixth defendant has filed the memo to the effect that he has handed over the shop bearing door No.44-A to the second defendant herein and others. In Ex.B-9 it is stated that at the request of the first defendant, the sixth defendant has handed over the shop to the second defendant and others on 21.1.1985. Recording the memo, the suit in O.S.No.140 of 1984 on the file of District Munsif, Dharapuram was dismissed as settled out of Court on 6.2.1985 itself. Ex.B-10, an extract of the decree, shows that the suit was filed and taken on file on 7.3.1984 which was much prior to the deed of sale in favour of the defendants 2 to 5, namely, 2.5.1984. We have already seen that the suit agreement covers the both Door No.44 and Door No.44-A. Admittedly, the sixth defendant was in possession of door No.44-A. D.W.3, who is one of the attesting witnesses to the agreement

of sale (Ex.B-18), has deposed that he knew the sixth defendant. If he has attested the agreement of sale dated 18.11.1983, as expected from a normal and prudent man, he would have informed the sixth defendant who is his friend about the agreement of sale entered into between the first defendant and the defendants 2 to 5 and there would have been some averments in his (sixth defendant) plaint regarding the agreement of sale dated 18.11.1983. It is also an additional reason to hold that the agreement dated 18.11.1983 is not a genuine document and it is an antidated agreement.

30. Be that as it may, the evidence of P.W.1 coupled with the filing of the suit by the sixth defendant wherein he has referred to the agreement of sale entered into between the plaintiff and the first defendant, which was instituted much before the sale deed dated 2.5.19 84 (Ex.B-1) clearly shows that the plaintiff has established the validity of the agreement of sale dated 2.5.1984. The defendants have also not disputed the execution of the agreement dated 25.2.1984 and the only defence pleaded by them was that subsequent to their sale, the plaintiff and the first defendant colluded together and created an anti-dated agreement. The fact of filing a suit by the sixth defendant and there was a memo of compromise in Ex.A-9 wherein the first defendant has signed as one of the parties clearly show that the plaintiff has established his agreement of sale. Though there is some typographical mistake in Ex.A-8 with reference to the date of agreement dated 25.2.1984, that would not mean that there was no agreement at all between the plaintiff and the first defendant. The advocate who was appearing for the sixth defendant was examined as P.W.2 and he has clearly stated that the suit in O.S.No.140 of 1984 on the file of District Munsif, Dharapuram was instituted by the sixth defendant and a compromise was arrived at in his office. His evidence is that after the papers were returned by the Court for the attendance of the parties, the sixth defendant took back the papers and before returning the entire case bundle to the party he took Xerox copy of the compromise memo filed before the Court. His evidence is acceptable as Ex.A-9 which is said to be a copy of the compromise memo filed contains the seal of the Court and also the stamps that were affixed on the memo of compromise along with signature of the parties. The compromise memo was filed before the Court on 17.3.1984 itself and if there was an earlier agreement of sale dated 18.11.1983, the first defendant would not have entered into the memo of compromise with the plaintiff and the sixth defendant as under the compromise, the sixth defendant was required to pay daily rent of Rs.12/- to the plaintiff. The statement contained in the memo of compromise also implies that the agreement dated 18.11.1983 cannot be regarded as a genuine one as it would not be expected from the first defendant to sign the memo of compromise filed in the Court, if there was an earlier agreement dated 18.11 .1983.

31. One another factor is that when the plaintiff (P.W.1) was cross-examined, there was not even a suggestion that the suit agreement was not a genuine or true one. So also, when D.W.1 was examined, he did not say that the agreement Ex.A-1 was a fabricated and antidated document. The fifth defendant who was examined as D.W.2 has also not deposed anything against the agreement, Ex.A-1. As we have already observed, the defendants have not questioned the execution of the agreement in Ex.A-1. Their only case is that Ex.A-1 is anti-dated which is not correct as the prior litigation between the

sixth defendant and the plaintiff and the first defendant shows the existence of the suit agreement of sale between the plaintiff and the first defendant.

32. It is also relevant to mention here that the first defendant did not send any reply to the suit notice, Ex.A-3 and he did not deny the execution of the suit agreement. He also did not appear before the Court denying the execution of the suit agreement. The contesting defendants 2 to 5 have not denied the signature of the first defendant found in Ex.A-1. Therefore there is no difficulty in holding that the agreement, Ex.A-1 was validly executed.

33. Learned senior counsel referred to the decision in RAM NIWAS v. BANO (2000) 6 SCC 685) wherein the Supreme Court held that in a suit for specific performance where the subsequent purchaser challenges the original agreement to sell as being fictitious and not genuine, though the suit was decreed by the trial Court, the first appellate Court ought to consider the evidence and record its own finding as to whether the original agreement was true and valid. There can be no quarrel over the proposition of law laid down by the Supreme Court. We have already held that the learned Subordinate Judge was correct in recording the finding that the agreement relied upon by the defendants 2 to 5, Ex.B-18 is not a true and genuine one.

34. As far as willingness of the plaintiff is concerned, it is clear that the agreement was entered into on 25.2.1984 under Ex.A-1 and three months' time for the execution of sale deed would expire on 25.5 .1984. Even before the expiry of that period, the first defendant executed the sale deed, Ex.B-1 in favour of the defendants 2 to 5 on 2.5.1984 and immediately thereafter, the plaintiff issued a notice on 15.5.1984 and since there was no reply, he applied for a certified copy of the sale deed on 31.5.1984 as seen from Ex.B-2 which was made ready on 1.6.1984 and the plaint was presented on the reopening date of the Court after summer vacation, viz., 11.6.1984. The fact that the plaintiff has taken action soon after he came to know about the sale in favour of the defendants 2 to 5 and instituted the suit immediately shows that he was willing to perform his part of the contract. The evidence of the plaintiff is that soon after he entered into the suit agreement, he met all the tenants in Door Nos.44 and 44A of the suit property requesting them to vacate the property which forced the sixth defendant to file a suit on 7.3.1984 in so far as Door No.44-A is concerned. The suit agreement was entered into on 25.2.1984 and the plaintiff had taken immediate steps to execute the deed of sale and these facts clearly show that the plaintiff was willing to perform his part of the contract.

35. Mr.V.K.Muthusamy, learned senior counsel referred to the evidence of P.W.1 wherein he has stated that he owned 12 acres of garden land and 2 or 3 houses and originally he had a sum of Rs.25,000/- in his bank account, but that was not available now and submitted that since the plaintiff has admitted that he was not having cash and other properties, the plaintiff had no means to perform his part of the agreement of sale. Learned senior counsel referred to the written statement filed by the defendants 2 to 5 wherein it is stated that the plaintiff had no capacity to pay balance of the agreed price. He also referred to the evidence of D.Ws.1 and 2 wherein they

have stated that the plaintiff had no capacity to pay a sum of Rs.1 lakh. Learned senior counsel referred to the decisions of the Supreme Court in PUSHPARANI S.SUNDARAM v. PAULINE MANOMANI JAMES (2002) 9 SCC 582), THIRUGNANAM,N.P. ETC. v. DR.R.JAGAN MOHAN RAO & OTHERS (1996-1-L.W.239) and HIS HOLINESS ACHARYA SWAMI GANESH DASSJI v. SITA RAM THAPAR (1996)4 SCC 526) and submitted that the mere plea that the plaintiff was ready and willing to perform his part of the contract is not sufficient and the Court must take into consideration the conduct of the plaintiff both prior and subsequent to the filing of the suit along with other circumstances and the Court should infer from the conduct of the parties and from the circumstances, whether the plaintiff was ready and willing to perform his part of the contract. Learned senior counsel submitted that the evidence of the plaintiff is clear that he had no capacity to perform his part of the contract and hence, learned trial Judge was not correct in not going into the question, but granted a decree for specific performance.

36. Mr.Ashokan, learned counsel for the first respondent, on the other hand, submitted that since the first defendant has transferred the property even before the expiry of three months' time from the date of suit agreement, the readiness and willingness to pay the balance amount on the part of the plaintiff does not assume much importance. In support of his submission, he relied upon the decision of the Supreme Court in T.MOHAN v. KANNAMMAL & ANR. (JT 2002 (2) SC 163). He also relied upon the decision of the Supreme Court in SURYA NARAIN UPADHYAYA v. RAM ROOP PANDEY (AIR 1994 SC 105) and submitted that since the has deposited the money as directed by the Court within the time stipulated by the Court, the readiness and willingness of the plaintiff should be inferred.

37. We are of the view that the submission of Mr.V.K.Muthusamy, learned senior counsel that the trial Court should have gone into the question of readiness and willingness of the plaintiff before granting the relief of specific performance is not a ground to remit the matter to the trial Court after a period of nearly 18 years from the date of filing of the suit and the parties have let in evidence. We have already held that the plaintiff has shown his willingness to perform his obligation under the agreement of sale.

38. As far as the question of readiness and willingness is concerned, the plaintiff, it is true, must establish his capacity to perform his part of the contract, but however, it is not necessary that he must produce the actual cash before the Court to show his capacity to perform his part of the contract. The defendants 2 to 5 themselves have admitted that the plaintiff is an influential person. The plaintiff has also in his evidence has stated that he was ready and willing to perform his part of the contract. He has taken steps to file the suit immediately after he became aware of the sale in favour of the defendants 2 to 5 by the first defendant. In his evidence, the plaintiff has stated that he had the capacity to pay a sum of Rs.80,000/-. Though D.Ws.1 and 2 have denied that the plaintiff had the capacity to pay the balance of sale consideration, as held by the Supreme Court in R.K.MOHAMMED UBAIDULLAH v. HAJEE C. ABDUL WAHAB (2000) 6 SCC 40 2), where the evidence is contradictory, the court must keep in view the

circumstances before deciding which version is acceptable.

39. We are of the view that the ratio laid down by the Supreme Court in T.MOHAN v. KANNAMMAL & ANR. (JT 2002(2) SC 163) would squarely apply as in the case before the Supreme Court the vendor transferred the property in favour of the purchaser before the expiry of the period provided under the agreement and it was held that the question of readiness and willingness to pay the balance of sale consideration is not of much importance. Here also, even before the expiry of the time-limit stipulated in the suit agreement, the first defendant has transferred the property to the defendants 2 to 5 and they were in possession of the property also and hence, the question of readiness does not assume much importance in the factual background of the case. Further, as in the case before the Supreme Court, the plaintiff herein has averred in the plaint that he was ready and willing to perform his part of the contract which was reiterated in the notice dated 15.5.1984 (Ex.A-3). The plaintiff has also deposed in his deposition that he was ready and willing to perform his part of the contract. Apart from that, after the decree granted by the trial Court, the plaintiff has deposited the entire sale consideration. Learned counsel for the respondent has also brought to the attention of this Court that during the pendency of the appeal the sale deed was executed on 23.2.1993 in favour of the plaintiff through the Court and he has also produced the copy of the sale deed before this Court.

40. As far as the decision of the Supreme Court in RAM NIWAS v. BANO (2000) 6 SCC 685) is concerned, we have already held that the trial Court has recorded a finding on the question of capacity of the plaintiff to pay the advance amount. Further, this Court has gone into the evidence available on record to determine the question of readiness and willingness. We hold that on evidence it is clear that the conduct of the plaintiff and the other attendant circumstances show that the plaintiff was ready and willing to perform his part of the contract. The Supreme Court in THIRUGNANAM, N.P.ETC. v. DR.R.JAGAN MOHAN RAO & OTHERS (1996-1-L.W.239) held that the conduct of the party prior to and subsequent to the filing of the suit should also be taken into account along with other attendant circumstances. The attendant circumstances which are relevant for the purpose of this case are the execution of the deed of sale itself by the first defendant even during the currency of the suit agreement of sale and the prompt action taken by the plaintiff in approaching the Court immediately thereafter which show that the plaintiff was ready and willing to perform his part of the contract.

41. In so far as the decision of the Supreme Court in HIS HOLINESS ACHARYA SWAMI GANESH DASSJI v. SITA RAM THAPAR (1996)4 SCC 526) is concerned, we have already held that the plaintiff has shown his readiness and willingness to perform his part of the contract. Learned senior counsel also referred to the decision of a Division Bench of this Court in VALLIAMMAL @ VALLIATHA & OTHERS v. ANGAMMAL & OTHERS (2002 (1) TLNJ 260), but the decision has no application as it is not a case where the plaintiff has come to the Court with false testimony and we do not find any false testimony on the part of the plaintiff which disentitles him to claim the relief of specific performance. On the other hand, the decisions of the Supreme Court in T.MOHAN v. KANNAMMAL & ANR. (JT 2002 (2) SC 163) and SURYA NARAIN UPADHYAYA v. RAM

ROOP PANDEY (AIR 1994 SC 105) support the case of the plaintiff as the plaintiff has deposited the entire balance of sale consideration within the time stipulated by the trial Court when the suit was decreed. We therefore hold that the plaintiff has complied with the directions of the Court within the time limit provided in the decree which shows that the plaintiff has proved his readiness to perform his part of the contract. We have already held that the plaintiff was always willing and therefore we hold that the plaintiff has established that he was ready and willing to perform his part of the contract.

42. The Supreme Court in MANJUNATH ANANDAPPA URF. SHIVAPPA HANASI v. THAMMANASA AND ORS. (2003-3-L.W.5) has held that the plaintiff in a suit for specific performance should not only raise a plea that he had all along been even on the date of filing of the suit ready and willing to perform his part of the contract, but also prove the same and where the plaintiff filed the suit almost after a period of six years from the date of agreement of sale, the argument that the plaintiff would not be entitled to the relief of specific performance could be accepted. Here, the plaintiff has raised a plea that he had all along been even on the date of filing of the suit ready and willing to perform his part of the contract and proved his capacity also as it is stated by him that he is a person possessing properties. The plaintiff also deposited the balance of sale consideration when he was directed by the court to deposit the same. Therefore the ratio laid down by the Supreme Court would squarely apply to the facts of the case.

43. Mr.V.K.Muthusamy, learned senior counsel submitted that even assuming that the agreement of sale dated 18.11.1983 (Ex.B-18) is not genuine, the purchasers were not aware of the prior claim and the onus that they were not aware of the agreement of sale dated 25.2.1984 in favour of the plaintiff is discharged by mere denial as such onus can be discharged by mere denial. He referred to the decision of the Patna High Court in RAMCHANDER v. BIBI ASGHARI (AIR 1957 Patna 224) and the decision of Orissa High Court in DHADI DALAI v. BASUDEB SATPATHY (AIR 1961 Orissa 129). There can be no quarrel over the proposition of law submitted by Mr.V.K.Muthusamy, learned senior counsel that the onus of proving that the subsequent purchaser had no notice of a prior claim is discharged by mere denial. Learned senior counsel also submitted that the plaintiff had not made any enquiry at all as to the possession and according to him, the plaintiff had actually avoided such an enquiry and he knew very well about the agreement of sale dated 18.11.1983 and the fact that the tenants were in possession of the property. His further submission is that the plaintiff kept quiet till the execution of the deed of sale and he did not even pay or even tender money to the vendor and there is no pleading also to that effect and on the other hand, there is no evidence to show that the defendants 2 to 5 had knowledge of the agreement of sale executed in favour of the plaintiff. He submitted that the defendants 2 to 5 are bona fide purchasers which can be inferred from the circumstances, namely, absence of any notice and payment of sale consideration by the defendants 2 to 5 in favour of the first defendant. He therefore submitted that the defendants 2 to 5 have not acted in a mala fide manner and there is no dishonest act committed by them and there are no unethical circumstances and they have paid the sale consideration. Learned senior counsel relied upon the

decision of this Court in PARVATHATHAMMAL v. SIVASANKARA (AIR 1952 Madras 265) and submitted that where a person other than the vendor is in actual possession of the property it behoves a prospective purchaser to ascertain what all rights the person in actual possession really has in respect of the property and the omission by the purchaser to make such an enquiry would amount to wilful abstention and gross negligence and is bound by the existing equity in favour of the purchaser. He also relied upon the decision of this Court in VEERAMALAI v. THADIKARA (AIR 1968 Madras 383) on the aspect of enquiry by the subsequent transferee on the character of possession of person in occupation. He also referred to the decision of this Court in ARUNACHALA THEVAR v. GOVINDARAJAN CHETTIAR (1977 II MLJ 431) wherein this Court held that the benefit of section 19(b) of the Specific Relief Act would apply where the transfer is for value and the consideration has been paid and the subsequent transferee has taken the transfer in good faith and both the purchase and the payment of consideration were made without notice of prior contract. He also relied upon the decision of this Court in MARWADI SUMERMAL JAMATRAJ FIRM BY PARTNER, JAMATRAJ v. BANDADE THUKKAPPA ALIAS THUKKAPPA (DIED) AND ANOTHER (1944 I MLJ 376) and submitted that under section 27 of the Specific Relief Act, 1877 if the balance money has been adjusted, then it can be stated that the money has been paid.

44. On the other hand, Mr.Ashokan, learned counsel for the first respondent submitted that the defendants 2 to 5 are not bona fide purchasers for value as the facts clearly show that the sale transaction was concluded in a hurried manner to defeat the claims of the plaintiff and hence, they cannot be regarded as bona fide purchasers at all. He relied upon the decision of the Supreme Court in R.K.MOHAMMED UBAIDULLAH v. HAJEE C. ABDUL WAHAB (2000) 6 SCC 402) wherein the Supreme Court held that the subsequent purchaser must prove that he is a bona fide purchaser for value without notice and the burden of proof of good faith is on the purchaser who pleads that he is an innocent purchaser. He also submitted that the case of the defendants 2 to 5 has to fail as the transferees have not paid the entire sale consideration before they had notice of the agreement dated 25.2.1984 as the payments in the instant case were made only subsequent to the notice dated 15.5.1984 and hence, under the provisions of section 27(b) of the Specific Relief Act, 1877 the defendants are not entitled to any relief. He also relied upon the decision of this Court in M/s.FUTNANI DAIRY FARM v. RANGASWAMY NAAR (1994 I MLJ 119) wherein Mr.M. Srinivasan,J. (as His Lordship then was) presiding over the Bench held that where the entire consideration has not been paid to the vendor, the purchaser is not entitled to claim the benefit of section 19(b) of the Specific Relief Act.

45. We have carefully considered the submissions of Mr.V.K. Muthusamy, learned senior counsel, for the appellants and Mr.Ashokan, learned counsel for the first respondent. We have already held that the facts do indicate that the deed of sale was obtained by the defendants 2 to 5 in a hurried manner just before the expiry of three months' time limit stipulated in the suit agreement of sale, Ex.A-1. We have also held that the plaintiff has taken steps to evict the sixth defendant from the portion of the property in his occupation which is also a part of the property covered under the suit agreement of sale and the defendants 2 to 5 are neighbours. We have held that

it is impossible to believe that the sixth defendant would not have informed the defendants 2 to 5 about the action taken by the plaintiff for eviction of the sixth defendant which forced the sixth defendant to file a suit against the plaintiff and the first defendant. We have already held that it is not open to the defendants 2 to 5 to plead ignorance of the suit agreement of sale. We have held that the agreement of sale dated 18.11.1983 in favour of the defendants 2 to 5 is not a genuine one which would imply that the defendants 2 to 5 are not bona fide purchasers for value. The fact that the defendants 2 to 5 relied upon the agreement of sale dated 18.11.1983 clearly shows that they have acted in a mala fide manner. Further, as seen from Exs.B-12 to B-16, part of sale consideration was paid subsequent to Ex.A-3 notice and the payments covered under Exs.B-13, 14,15 and 16 were paid subsequent to the institution of the suit.

46. Mr.Varadachariar,J. (as His Lordship then was) in ARUNACHALA v. MADAPPA (AIR 1936 Madras 949) held that in terms of section 27(b) of the Specific Relief Act, 1877 the transferee must satisfy that the money was paid in good faith without notice of the original agreement. Learned Judge held that the payment of consideration must have been before the transferee had notice of previous agreement. Admittedly, the payments were made after Ex.A-3 notice. A Division Bench of this Court in VEERAMALAI v. THANDIKARA (AIR 1968 Madras 383) followed the decision of the Bombay High Court in Himatlal Motilal v. Vasudev Ganesh (1912) ILR 36 Bom 446) and the earlier decision of this Court in Mohammed Haneef Sahib v. Board of Trustees Juumma Masjid, Adoni (AIR 1944 Mad.421) and held that the words in section 27(b) of the Specific Relief Act, 1877, "who has paid his money" should be construed to mean the transferee who has paid the whole of the consideration and not a transferee who has paid only part of it. The Division Bench held that the entire purchase money should be paid before the subsequent purchaser obtained knowledge of the prior agreement of sale. In the instant case, even on 15.3.1984 when the notice for Ex.A-9 was served, the defendants 2 to 5 had knowledge of the agreement of sale Ex.A-1 and the entire sale consideration was not paid on 15.5.1984 or even on the date when the suit was instituted on 11.6.1984.

47. Further, it is not a case of adjustment as happened in the case of MOHAMMAD HANEEF SAHIB v. THE BOARD OF TRUSTEES, JUMMA MASJID, ADONI (1994 I MLJ 376). In that case the amount was adjusted even at the time of sale against the amount due under a prior mortgage. Even assuming that the debts of the vendor were taken over and there were payments by the defendants 2 to 5 to the vendor, we hold that the defendants 2 to 5 are not bona fide purchasers for value as they had knowledge of the suit agreement of sale dated 25.2.1984.

48. As far as the enquiry that should have been made by the plaintiff is concerned, we are of the view that the decisions relied upon by the learned senior counsel deal with the case of duty of the purchaser. In this case, the purchasers are the defendants 2 to 5 and they must establish that they made a proper enquiry. Therefore the submission of the learned senior counsel that the plaintiff should have made prior enquiry does not carry any conviction as he was still an agreement holder on the date of suit

and the defendants 2 to 5 were the purchasers and they must establish that they purchased the property for value and the consideration was paid and they got the sale in good faith and the payment of consideration was made without prior notice of the suit agreement. Therefore, the submission of the learned senior counsel that the plaintiff failed to make enquiry regarding the character of possession of the property by the defendants 2 to 5 does not assume importance as he was still an agreement holder. On the other hand, the evidence is clear that the plaintiff took steps to evict the tenant, namely, the sixth defendant. The defendants 2 to 5 should have made an enquiry when their neighbour was asked by the plaintiff to vacate the portion in his occupation during the currency of the suit agreement, but before the deed of sale was executed in their favour. Further, the plaintiff in his deposition has stated that he met the defendants 2 to 6 and informed them about his agreement, but there is no contra evidence to the effect that the plaintiff never approached them and the plaintiff's statement remains uncontroverted. We are of the view that it is possible to draw an inference on the facts and circumstances of the case that the defendants 2 to 5 were aware of the suit agreement and they had the knowledge of what was going on in the adjacent portion and it is not possible for the defendants 2 to 5 to disown the knowledge of the events that had occurred in the neighbouring shop which resulted in the filing of a suit by the sixth defendant.

49. Learned senior counsel also submitted that the agreement of sale, Ex.A-1 recites to the effect that the plaintiff should take possession on payment of sale consideration which clearly shows that it is a false recital as the vendor knew very well that the property was in possession of the defendants 2 to 6 as tenants and hence, the clause containing a direction to the plaintiff to take possession on payment of sale consideration is a false one. Learned counsel for the first respondent, on the other hand, referred to the agreement of sale dated 18.11.1983 (Ex.B-18) in favour of the defendants 2 to 5 wherein a similar recital is also found. We are of the view that the mere recital in the sale agreement that the purchaser should take possession would not cast a doubt on the genuineness of the agreement or such a clause would not disprove the agreement itself as the parties might have agreed that vacant possession should be handed over to the purchaser at the time of sale. Moreover, the fact that the plaintiff took steps to evict the tenant in occupation of the property is evident from the filing of suit by the sixth defendant wherein the sixth defendant admitted that the plaintiff took steps to evict him from the property. Further, the clause that the vendor would be in a position to hand over the vacant possession of the agreed property would assume importance and become relevant at the time of execution of sale deed and since that event did not take place, the recital in the agreement of sale that it would be open to the plaintiff to take possession of the property on payment of agreed amount does not prove that the agreement is not a genuine agreement. As we have already held that when the vendor of the property has not chosen to deny the agreement in Ex.A-1 and there is also no explanation from the defendants 2 to 5 as to why the first defendant has not given evidence to support the claim of title made by them under Ex.B-1 when the plaintiff has produced the agreement of sale dated 25.2.1984. Therefore, it cannot be stated that the agreement of sale (Ex.A-1) is not a genuine one.

50. Learned senior counsel submitted that the hardship would be caused to the defendants 2 to 5 if the sale in their favour is set aside. Learned senior counsel submitted that the property is situate in a busy locality in Dharapuram town and the plaintiff has taken an unfair advantage and taking into consideration the hardship that would be caused to the appellants, the relief of specific performance should be denied to the plaintiff. However, we are unable to accept the submission of the learned senior counsel for the reason that the appellants/defendants 2 to 5 are not bona fide purchasers without notice of the agreement of sale, Ex.A-1 and the impression that is gained is that the sale deed was executed on 2.5.1984 just before the expiry of three months' period stipulated in the sale agreement. Further, we are of the view that the defendants 2 to 5 had knowledge of the suit agreement of sale and further, the plaintiff fulfilled all the requirements for the grant of the relief of specific performance. The fact that hardship would be caused to the defendants 2 to 5 cannot stand in the way of the plaintiff from getting the necessary relief prayed for by him. Further, the plaintiff has deposited the entire sale consideration and it is also stated that during the pendency of the appeal the sale deed was executed on 23.2.1993 in favour of the plaintiff through the Court. Therefore the hardship that would be caused to the defendants 2 to 5 is not germane when the plaintiff is entitled to the relief.

51. Learned senior counsel also submitted that the sixth defendant has surrendered possession in favour of the defendants 2 to 5 as seen from the Varthamanam letter, Ex.B-3 and handed over the possession of the property to them on 2.5.1984, but, the plaintiff has not amended the plant even after he was aware of the fact that the sixth defendant handed over the possession. A reading of the prayer in the plaint clearly shows that the defendants are to be directed to deliver possession of the suit property subject to the sixth defendant delivering possession of Door No.44-A on 1.3.1985 and since the sixth defendant has not delivered possession to the plaintiff on 1.3.1985, the earlier part of the prayer to direct the defendants to deliver possession of the property would operate. Accordingly, a decree was granted in such manner directing the defendants 1 to 5 to hand over possession of Door No.44-A and so far as Door No.44 is concerned, the plaintiff was directed to take possession in accordance with law. Therefore, the omission to amend the plaint after the si xth defendant handed over possession to the defendants 2 to 5 is immaterial as decree has been granted in a proper manner as prayed for in the plaint.

52. We therefore hold that the plaintiff has established that the suit agreement of sale is a valid and genuine document. The plaintiff has established that he was ready and willing to perform his part of the contract. We have also held that the agreement dated 18.11.198 3 (Ex.B-18) in favour of the defendants 2 to 5 is not a genuine, true and valid agreement. We have held that the defendants 2 to 5 are not bona fide purchasers of the property without notice of the suit agreement of sale dated 25.2.1984. We therefore hold that the learned Subordinate Judge has properly exercised his discretion in granting the relief of specific performance in favour of the plaintiff.

53. The Supreme Court in MANJUNATH ANANDAPPA URF. SHIVAPPA

HANASI v. TAMMANASA AND ORS (2003-3-L.W.5) held that the Court of appeal should not ordinarily interfere with the discretion exercised by the trial Court. We find that the discretionary relief of specific performance was granted in favour of the plaintiff by the trial Court on proper grounds and no ground has been made out to interfere with the judgment and decree of the trial Court. Accordingly, the appeal fails and the same is dismissed. However, in the circumstances, there will be no order as to costs.

Index: Yes
Website: Yes

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To
1. The Subordinate Judge, Dharapuram (with records)
2. The Section Officer, VR Section, High Court,